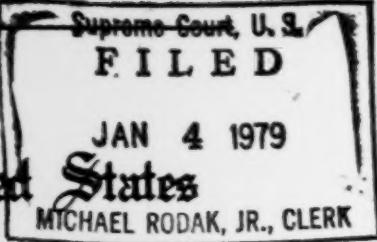


In The

Supreme Court of the United States



October Term, 1978

No. 78-562

MATTHEW MADONNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT OF FACTS

The petitioner timely filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The petitioner sought review of a judgment entered on September 1, 1978 affirming the denial of his motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure which sought to set aside or modify his sentence.

The Government served its brief in opposition in November 1978.

This reply brief is submitted for two reasons: to bring to the Court's attention a recent decision of the Fifth Circuit on the issue at bar and to correct a factual error contained in the Government's brief.

ARGUMENT

On September 18, 1978, the United States Court of Appeals for the Fifth Circuit decided the case of *United States v. Hernandez*, 580 F.2d 188 (5th Cir. 1978).

The Court reluctantly held that it was compelled by the need for consistency to sustain consecutive sentences for a single transaction which led to multiple convictions for violation of the narcotics laws.

In so doing, the Court stated that were they writing on a clean slate, they would hold otherwise. They made their views known in rather pointed language at pp. 190, 191:

"Were this panel to consider the consecutive sentences problem afresh, we would incline toward the views of the Fourth, Sixth and Tenth Circuits, all of which would proscribe consecutive sentences in a case such as this. *U.S. v. Curry*, 4 Cir. 1975, 512 F.2d 1299, 1306; *U.S. v. Atkinson*, 4 Cir. 1975, 512 F.2d 1235, *U.S. v. Stevens*, 6 Cir. 1975, 521 F.2d 334; *U.S. v. Olivas*, 10 Cir. 1977, 558 F.2d 1366.

That there was here, in effect, but one transaction, none may dispute. It appears to us to impute an unduly harsh intention to Congress to divine a purpose on its part to permit two sentences totaling 20 years in a case such as this.

when the governing statute fixes a maximum period of confinement of 15 years."

The Circuit Court felt the issue to be of sufficient import to warrant a rehearing *en banc*, which was granted on November 7, 1978. This rehearing was granted on the Court's own motion and required the vote of at least eight judges.

Thus, we have an intra-circuit, as well as an inter-circuit, split on this important issue of congressional intent which should be resolved by this Court.

FACTUAL CORRECTION

The Government, in a footnote to its brief on page 7, states that the district court did not consider the petitioner's prior narcotics conviction.

This is in error in that the petitioner did not have a prior narcotics conviction. The prior conviction was for manslaughter.

CONCLUSION

For the reasons stated in the petition and this reply, we respectfully pray that a writ of certiorari issue.

Respectfully submitted,

s/ Gustave H. Newman
Attorney for Petitioner

Roger Bennet Adler
On the Brief